

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

West District.
September 1814.

WESTERN DISTRICT. SEPT. TERM, 1814.

**BROWN &
WIFE**

vs.

**PARISH JUDGE
&c.**

BROWN & WIFE vs. PARISH JUDGE, &c.

Appeal dis-
missed the ap-
pellant not
appearing.

THE appellant not appearing, either in person,
or by attorney, the appeal was dismissed.

RAPER'S HEIRS vs. YOCUM.

No parol
evidence of a
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and Yocum replied that it was five hundred dollars, and said that he was going to take the boy to Raper, and should have done it sooner, but that the boy had been sick : that some days afterwards the witness saw the boy at Raper's house, and that his name was Bill.

JAMES ROY, a witness of the defendant, deposed : that in July last, one Benjamin Fields held Yocum's note for \$ 550, and told Raper that if he would take up that note for him, he would let him have the boy ; that Raper agreed to it, provided he liked the boy. That Yocum took, or sent, the boy to Raper on trial. That Raper, after trying the boy, was pleased with him and agreed to take him at five hundred dollars, and Yocum also agreed to let Raper have him for that price, and gave Fields his own note for fifty dollars, the surplus of the first note above the price of the boy, Fields being there present. That at the same time Raper gave Fields a horse by bill of sale, at \$ 45, and paid him some money amounting together to fifty dollars, also an order on Mess. Louailliers for \$ 100, and another on Mess. Toussaint and Marc, for one hundred dollars, that Raper, at the same time, gave to Fields his own note for twenty-three cows and calves, valued the witness thinks at ten dollars each, and had before furnished him with two beeves at ten dollars each. That Fields took all these notes and orders and left them and said that

West District
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

West District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

the note he held on Yocum was at the moment locked up so that he could not get it, it having been by him given to Mrs. Yocum, the defendant's mother to take care of for him and she had gone out, but he said he would go to her and be back in a little time with the note and went away. That the witness then, at the request of both parties, drew off a bill of sale of the boy from Yocum to Raper, which he read to them twice over and each of them then took and read it and approved of it. That Yocum then said he would sign it, but would not deliver it till he got up his note, that Fields would soon be back with it, when all would be completed, to which Raper agreed. That Yocum then signed the bill of sale but kept it. That Raper stayed till it was almost dark, waiting for Fields, but he did not return and Raper went away, without the bill of sale. That Mrs. Yocum lived at the place where they then were, but was gone abroad. That a few days afterwards the witness went with Yocum to Raper's, to get the business compromised as he expressed it, and when there, Yocum told Raper he must take the boy home, on which Raper said to him "don't take him, I'll buy him any how:" and Yocum thereupon left the boy at Raper's, that Fields was then at Yocum's. That he drew the bill of sale on the 2d of August. That he afterwards saw Yocum and Fields together, when they were talking something about a

note, that Fields has lived two years in Yocum's house; but is occasionally absent. That Raper had the boy on trial a month, or six weeks. The plaintiffs' counsel then shewed the order drawn by Raper on Toussaint which the witness identified.

West District
September 1814.

RAPER'S
HEIR
TH
YOCUM

BENJAMIN FIELDS, the person above spoken of was then called by the plaintiffs—who swore that he never received any property from Raper nor any bill of sale of him. That he did receive from him some cash for work done, but never any on any other account, nor any note for cows and calves, nor any beeves that he recollects, that he did get several things from Raper, but paid him for them in work. That he never received a note for fifty dollars from Yocum, that he recollects. That he did receive from Raper an order on Toussaint, but does not remember for what amount, nor what became of it, that he does not remember to have received any order from Raper, on Mess. Louailliers; that he once held Yocum's note for \$ 550, some time before the 18 of August last and that it was given for a race on the Bayou Pierre, that he thinks he has lost the note for fifty dollars, which was given him by Yocum about the first of last August. That he still holds Yocum's note for \$ 550 and has asked Yocum to pay it since last August, but he has not paid it, that he did once have this note in a trunk of old Yocum's, which was seldom locked and has had his papers there when it has been

West District.
September 1814.

RAFER'S
HEINE
vs.
YOCUM.

locked, that no one in particular kept the key of the trunk that he knows of, that he does not recollect being at Yocum's about the 2d of August last, nor does he know how to write and read but very little.

Baldwin, for the plaintiffs. The defendant complains of the decree of the District Court, ordering him to make and deliver a bill of sale for a slave, which he sold the ancestor of the plaintiffs, as prayed for in the petition.

THE question, presented for the consideration of the Court, is, whether parol evidence can be received of a sale of a slave, executed so far as the payment of the price, delivery of the property and signing the bill of sale, or whether our courts, under the existing laws can receive any parol evidence of such sale, the deed being destroyed.

It will be attempted to be shewn, that such a sale is valid and that such testimony of its existence ought to be admitted.

PREVIOUS to the enacting of the Civil Code, writing was not necessary for the perfecting of a sale of any species of property *Inst. Justinian. lib. 3, tit. 23, 24, Febrero Libreria de Escribanos, cap. 7, sec. 1, art. 19, Dig. lib. 19, tit. 1, De actionibus empti et venditi 55, Code, lib. 4, tit. 49, idem 17, 1 Domat 58.*

IN the case under consideration, the price was agreed upon and paid, the slave delivered, and

the bill of sale signed, and afterwards destroyed by the seller. The suit in the District Court was not brought for the slave, for he was in the plaintiffs' possession, but to obtain from the defendant a bill of sale, to be made with the requisite solemnities. The District Court decreed that this should be done and it is of this that the appellant complains.

West. District.
September 1814.

RAFER'S
HEIRS
vs.
TODUN.

It is anticipated that two objections will be made to the principle of the decree.

1. THAT the contract was by parol and therefore void, *Civil Code* 344, art. 2.

2. THAT the existence of the contract is disputed and no parol evidence can be admitted to prove it. *Civil Code* 310, art. 241.

1. THIS was not a verbal sale: it was written and signed, though the instrument was not delivered to the purchaser. Delivery is not required by the statute. It is enough that it is reduced to writing, and signed by the party selling. It is not required that it should be taken by the purchaser; nor is he obliged, if it was, to keep it: he may do so, and it is safest and most prudent that he should. The evidence of the sale does not rest alone on the statement made out, and sent up with the record, but also from an interrogatory put to and answered by the defendant. By which he was called upon to say "If he did not sign a

West District.
September 1814.

RAPER'S
HEIRS
vs
YOCUM

"bill of sale for the said mulatto boy, Bill, conveying him to your petitioner; and if he did not retain the said bill of sale from your petitioner and what he the said Thomas has done with the same?" To which he answered "That having made a bargain with Raper for the boy Bill, he had made out and signed a bill of sale of him, to be ready when Raper complied with his part of the bargain. That Raper never did perform his part of the bargain, therefore, said Yocum did not deliver him said bill of sale; and seeing some time afterwards that it was not Raper's intention to comply with his bargain, said Yocum destroyed said bill of sale." So much of the answer as goes to excuse the defendant ought not to be taken into consideration. The other part denies the fact sought to be disclosed by the plaintiffs. Now the question for discussion seems to be whether the title to the slave passed from Yocum; for if it did, before he can succeed in his defence, he must shew how he acquired a new one, as he cannot hold under that which he gave to another. What is a sale? The *Civil Code* 344, art. 1, defines it to be "an agreement by which one gives a thing for a price, in current money and the other gives the price in order to have the thing itself." THREE circumstances concur to the perfection of said contract to wit, the thing sold, the price and the consent.

Now it is clear that upon the agreement to sell the fixing and receiving the price, the delivery of the property and the signing of the bill of sale, he was no longer proprietor of the boy and he had no just pretence to claim him. It was immaterial then to Yocum, whether Raper ever received the sale or not, and as the title had passed from him, he could only acquire a new one by the same ceremony by which it was transferred. He, therefore, no longer owned the slave.

West District.
September 1814.


RAPER'S
HEIRS
or
YOCUM

II. CAN these facts be held to be legally proven by parol, without producing the bill of sale?

No principle of law, or rule of proceeding, is better established or more uniformly adhered to than this one, that the best evidence which the nature of the case furnishes must be produced, and that, when produced, it must be admitted: no authorities need be referred to, to establish this rule: Yocum destroyed the bill of sale, so that it could not be produced by the plaintiffs. Under this rule, therefore, as well as under another one equally well established, that no one shall avail himself of his own wrong, evidence of the contents of the bill of sale and all the circumstances attending it ought to be received. If so, more than enough is proven by the statement than is sufficient to justify the District Court in rendering and this Court in confirming the decree. Even admitting that Fields did not deliver Yocum's note, there is

West District
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

sufficient evidence to do away its effect, as to Raper, and to shew, if true, that it proceeded from a collusion between Fields and Yocum to defraud him. Though this is immaterial, as Raper fulfilled his part of the agreement by paying Fields the \$ 500. It did not enter into the contract, that Raper should undertake that Fields should deliver Yocum's note.

ARGUING then, as if the weight of evidence is in favor of the appellees, is it such as can be admitted?

THE doctrine in the *Civil Code, tit. 6, chap. 1*, does not apply to this case, as this was not a verbal sale.

It comes under the 241 art. page 310. This article presents two questions. 1 How are sales of immoveable property to be made. 2 How are they to be proven? They are to be reduced to writing. This was reduced to writing and signed and, therefore, not a verbal sale. If the writing is lost, how are then its existence and contents to be proved? The expressions in the latter part of the article are strong and if taken by themselves and unaccompanied by any other in the code, or incorrectly understood, might be the cause of the greatest injustice and destroy the right of the appellees. But these expressions are to be contrasted with, and explained by, others in the code, and in the statutes. These are abundant in favor of the appellees.

THE 1st. sec. of the 26 chap. of the 1st sess. of the Legislative Council has given the plaintiff in all cases the right of interrogating the defendant and to which he is bound to answer, provided the interrogatories do not tend to charge him with any crime or offence against any penal law. The Code 314 15, sec. 4, 5, has recognized and confirmed this right of the plaintiff and has made the answers of the defendant the best of testimony. This was the mode resorted to in the present case, and was one of the means by which the fact of the existence of the bill of sale was ascertained. The exclusion, therefore, of parol evidence by the said article must be taken at least with this exception of the mode of proof. But, it may be urged that the defendant's answer is as much a written evidence of the "existing" of the contract and a great foundation for a decree: admitting, however, that it may not be, still the other mode is open and adequate to the purpose of the appellees. Yocum confesses that the sale was written and signed by him, and afterwards destroyed, as is alleged, because Fields did not deliver the note and because Raper did not comply with his part of the contract. The question then is changed from a verbal sale, to an enquiry whether Yocum was justifiable in destroying the writing. Leave the question upon this ground and the strength of evidence is irresistible in favor of Raper.

BUT the doctrine of interrogatories is equally

West. District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM

West District
September 1814

RAVEN'S
HEIRS
vs.
YOCUM

clear. The defendant is bound to answer, and the Court to proceed upon the testimony furnished by him, or in case of his refusal to answer to take the facts as admitted, and decree accordingly. Here the evidence was furnished; and will or can the Court reject it? An interrogatory may be put to avoid the effect of limitation and shall it not be admitted to prove the existing of a deed? Judicial confession is the best of proof. *Pothier on Obligation, part 4, chap. 3, sec. 1, Febrero, 2 Part, lib. 3, chap. 1, sec. 7, art. 284.* It may be remarked that the doctrine, concerning interrogatories, is on a subsequent page of the Code to the one first cited, which gives the construction of the statute in favor of the appellees.

In addition to this, the *Civil Code* 312, art. 247, has provided for this case, by admitting parol evidence where the title is lost "through a fortuitous event, unforeseen accident, or overpowering force" and makes such a case an exception from the 241 art. in page 310. The appellees are protected by this exception. The force, here spoken of, is not such as is required by the common law of England to protect common carriers, viz. the act of God, or the king's enemies, because these terms are not known to our law and are not applicable to the subject; 2 *Esp. N. P. Gould's Edition* 245, 2 *Jurisprudence* 574, *Dig. l. 48 tit. 6, Id. l. 7, Code, lib. 9, tit. 12, Febrero Juicios. lib. 8, tit. 1, Civil Code* 384, 414, 16. The term

here used must be understood to mean such a force as could not be resisted in the manner in which it was applied. No matter in what form or shape it appears, no matter with what instrument, nor at what hour it is effected, if it was such as could not be resisted, it was overpowering force. A feeble man, or a child could burn or tear a deed, in the presence of the strongest individual, and yet it would be destroyed by an overpowering force, if it was not in his power to prevent it.

If, however, the appellees should be considered not to come within the letter, they certainly come within the meaning of the exception. It is providing the means of proving the existence and contents of deeds by inferior testimony when the better is lost. The subject is proof to be admitted in courts of justice. Now, no man endued with common reason would contend that evidence was a subject of robbing or theft. It never has, and from its nature never can be considered property. It is the means of acquiring and holding of property, but not property itself. It must be considered then to mean by a fortuitous event and unforeseen accident, burning, mislaying, loss, &c. and by overpowering force a case like the present, where the seller, after receiving the price and completing the contract, should destroy the instrument, without the purchaser being able to prevent it.

But, how can the doctrine of force be made

West District.
September 1814.

RAPEE'S
HEIR
vs.
YOCUM.

West District
September 1814

RAPER'S
HEIRS
vs.
YOCUM.

to apply here, as the seller himself destroyed the deed? And shall he be received to plead that the title was not destroyed by an overpowering force? And, therefore, the loss of it not to be justified by the appellees, the force which destroyed is not such as to entitle them to the benefit of parol evidence? Can the appellant urge this against his own act? This would be to let the owner of goods steal or rob them from the carrier and then present himself in court and say that the carrier was answerable because they were not taken by the king's enemies. The owner's default will excuse the carrier, 2 *Esp. N. P. Gould's Ed.* 247. But upon the principle here contended for by the appellant, the owner's destroying the goods by force leaves the carrier answerable for their full amount, and the salutary maxim, as old as jurisprudence itself, that no man shall avail himself of his own wrong, would no longer be in force.

It is not thought necessary to call into the argument the decisions, in England and in the different states, upon the statutes of frauds and perjuries, as this contract is considered to be a complete performance.

THE consequences of a different application of this rule or a different interpretation of the law would be alarming. If no parol evidence is to be admitted to prove the existence of such contracts or to disclose such transactions, what a door

will it open to frauds? As in the case now under discussion, a sale may be made and signed, the property delivered and the moment the money is received, the seller may with impunity seize with violence and destroy the instrument of conveyance: or if by accident the *bona fide* holder of real estate loses his written evidence of title, the former owner upon ascertaining the fact may institute a suit and according to this doctrine must recover: because there is no written proof.

If the office of a Parish Judge should be burnt, all the sales of real property there deposited, of which copies had not been taken, would be null, because the written evidence would be lost, and is the Court disposed to introduce all these calamitous consequences by their decision?

Porter, for the defendant. In this case, the District Court has ordered the appellant, the defendant below, to make a conveyance for the negro claimed in the plaintiffs' petition. This decree has been rendered alone, on parol testimony and the answer of the appellant, to the interrogatory propounded to him by the appellees in the Court below. That judgment is conceived to be incorrect on two grounds.

1. BECAUSE the evidence introduced shews that the contract entered into between the parties was *on a condition*; which condition remains yet unperformed by the appellees.

West District
September 1834.

RAFER'S
HEARS
VS.
YOCOM.

West District.
September 1814.

RAPER'S
HEIRS

VS.
YOCUM

2. THAT the parol evidence adduced to prove the contract, cannot under our laws be received, to establish a sale of this species of real property.

I. THE evidence proves that Yocum agreed to sell the negro to Raper, *on condition that he would take up a note, which Fields held of Yocum for \$550*: to this Raper consented, if he liked the boy and Yocum sent him on trial. The parties it appears afterwards met to pass the necessary writings for the property. The bill of sale was drawn up and signed by the appellant who declared, *at the time of signing it*, that he would not deliver the boy to Raper until he received the note which Fields held of him, and for which he had stipulated to sell his negro. This note Raper, nor his representative, have never yet delivered to the appellant and until they do, they have no right to call on him to make a title. If Fields has deceived them it is not our act and the note, for which the negro was sold, is yet in force against Yocum.

THE weight of evidence supports the above summary. Le Jeune's testimony is consistent with Roy's: Yocum telling the former he had sold the boy, is fully explained by the latter witness, who says indeed that Yocum had sold him: but then he adds the condition, and that condition remains yet unperformed. Le Jeune seeing him in possession of Raper, was the possession of the boy on trial.

YOCUM's answer to the interrogatories supports the declaration of the witness, he says he made a bargain for the boy with Raper, and that he had made out a bill to be delivered, when Raper complied with his part of the bargain. This answer, combined with the declarations of the witnesses, is conclusive as to this fact, and shews clearly the sale to have been a conditional one. The plaintiffs' counsel says, however, that all the latter part of Yocum's answer to the interrogatories must be rejected. He cites no authority, to justify this Court in doing so, on the contrary it is plain the whole must be taken together.—*Civil Code* 316, art. 264, *Pothier on Obligations*, part 4, chap. 3, sect. 4, art. 2, no. 827, *Febrero Cinco Juicios*, lib. 3, cap. 1, § 7, no. 285, *Curia Philippica*, vol. 1, p. 2, § no. 3.

West District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

THE evidence then clearly establishing that the appellees have not complied with their part of the contract, the judgment of the Court below ought to be reversed.

II. ALL the evidence to establish the plaintiffs' title is by parol, and it is submitted with confidence that this species of proof cannot be received, in this country, to prove a sale of slaves.

THE *Civil Code* 344, art. 2, prescribes that the sale of slaves must be by public act or under private signature. That all verbal sale of them shall be null, and that no testimonial proof

West District.
September 1814

RAPER'S
HEIRS
vs.
YOCUM

of them shall be admitted. And again the same authority, *page 310, art. 341*, says, that whenever the existence of such a covenant is disputed, testimonial proof shall not be admitted. These provisions cannot be made any stronger by argument. However in the 4th. page of the same book, *art. 13*, it is declared, that in construing laws the letter must not be abandoned on pretence of pursuing the spirit.

THESE provisions are imperative on the Court, and conclusive in this cause. Particular cases of hardship may, and will, arise under all general regulations of this kind. But, it is better for society, (so at least our Legislature has thought) that these regulations should be rigidly preserved, than that courts, under a pretence of doing equity, should establish their discretion as the boundary of right, render the provisions of the law on this subject uncertain, and introduce those evils of perjury and fraud, which the supreme authority has seemed anxious to guard against.

IN England, several of their most eminent Judges have lately regretted (and expressed that regret in strong terms) that their courts of equity, by their decisions, had broken in upon statutes similar to ours, which, if rigidly followed would have had a most beneficial effect on society. 2 *Vesey jun.* 243; 3d. *Vesey* 486, 712.

It is worthy of remark that the Spanish government in this country had a law of the same kind

In force, previous to the passage of our Code, which required all sales for real property to be in writing. Nay more, they were void if not passed before a Notary Public. *American Law Journal* 5. The necessity of such a provision no doubt was obvious to both governments who in this respect established similar regulations. The plaintiffs endeavour to escape from the force of the law cited from the Code, by a variety of arguments: some of them taking for a basis facts which are denied, and others, when the fact is clear, establishing principles which are incorrect, and it is hoped capable of being shewn so.

It is said that the price was paid and the sale passed: but a reference to the evidence proves the contrary.

It is said the sale was perfect by the act of signing and that the appellant by destroying it has laid a ground for the admission of parol testimony. But, here again the evidence is at war with the argument. By it we are informed that Yocum expressly declared he signed the bill of sale, on condition that he was not to deliver it until his note was given up. Would it not be strange if this could be held to be a completion of a sale, and would it not be still more strange, if this Court should by its opinion declare that if A. executes an act *sous seing privé*, which he declares he will retain in his hands, until he is paid for his property: that the moment it is written, no matter

West District,
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

West District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

under what condition, or no matter in what intention, it becomes without delivery a complete title to the vendee. The law is clearly opposed to this doctrine. *Febrero Libreria de Escribanos*, cap. 7, § 1, no. 19, *Curia Phillipica, Commercio terrestre, tit. Venta, lib. 1, cap. 12, no. 42*, *Pothier on Obligations, p. 4, cap. 1, art. 2, § 1, no. 714*, *Civil Code, 272, art. 68, ibid, 344, art. 5*.

If then, there was no title executed to Raper all arguments respecting the loss of it are fallacious. A man must be in possession of a title before he can lose it.

THE answer to the interrogatories it is alleged takes the case out of the statute. That answer states, that the appellant "had made out a title to be delivered to Raper when he complied with his bargain." No court can decree a conveyance on that declaration : and the evidence, so far from contradicting, supports it.

By the Court. It is proved in this case, by oral evidence, that a contract was entered into, between Thomas Yocum, the defendant now appellant, and Henry Raper, the conditions of which were that if Raper would *take up* a certain note of \$ 550, subscribed by the appellant in favor of a certain Benjamin Fields, he the appellant would sell him a mulatto boy. In consequence of this agreement it appears that Raper paid Fields in sundry articles the price agreed

upon between him and the appellant, to wit, \$ 500, and that the amount of the note in Fields's hands being more than the purchase money, the appellant gave Raper his note for the balance. It further appears that the appellant had prepared a bill of sale of the mulatto boy and signed it; but that he never delivered it, alleging that Raper had not complied with his part of the contract, and that he has since destroyed that paper. Fields having not surrendered the note which Raper was to take up, Raper, who had paid the full price of the mulatto boy, brought the present suit to compel the appellant to make him a legal and complete title to that slave. As to the possession Raper seems to have had it since the bargain was entered into.

West District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

Two questions arise in this case; one of law, and that is, whether a verbal promise, to sell that kind of property for the alienation of which the laws require a written act, can ever be recognised and enforced by a court of justice; the other of fact, to wit, whether Raper had complied with his engagement, so far as to enable him to call upon the appellant for a performance of his.

I. THE language of the law (*Civil Code 344, art. 2,*) with respect to the sale of immoveables and slaves is: "all verbal sales of any of these things shall be null, as well for third persons as

West District.
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

"for the contracting parties themselves, and the testimonial proof of it shall not be admitted." In the same chapter speaking of the promise to sell; "a promise to sell amounts to a sale, when there exists a reciprocal consent of both parties as to the thing and the price thereof; but to have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities as are above prescribed in *art. 2 and 3*, concerning sales, in all cases where the law directs that the sale be committed to writing." *Civil Code 346, art. 9.*

Nothing can be more positive than this prohibition of our laws, ever to recognise as valid a verbal sale or a verbal promise to sell an immovable or a slave. Witnesses offered to prove such a contract cannot ever be heard. Yet we are called upon, in opposition to this provision, to listen to that testimonial proof, and to decide upon the merits of that verbal contract, under pretence that we may, in certain cases, soften the rigour of the law. But surely, if such power can be exercised by courts of justice, it never can go the length of declaring that lawful which the laws have said shall be illegal.

In this case, however, it is alleged that the contract was not entirely verbal, because, according to the appellant's own confession, he had prepared a bill of sale, ready to be delivered to

the intended purchaser, as soon as he would fulfil the stipulated condition. But this paper was only the consideration to be given for the compliance of the other party with his engagement. It was not the instrument of the contract. That contract was never reduced to writing. We have it only from the mouth of the witnesses. They inform us that an agreement was entered into between the appellant and Raper, the conditions of which were that if Raper would take up a certain note of the appellant, the appellant would make him a bill of sale of a certain slave. Whether the appellant did or did not prepare that bill of sale ready for delivery, as the case might be, is not the question. The contract itself, which this court is called upon to enforce, was only verbal, and therefore not such as the laws can recognise.

West District.
September 1814.

~
RAPER'S
HEIRS
vs.
YOCUM.

II. FINDING ourselves under the necessity of reversing the judgment on that ground, it is hardly of any use to inquire into the other question, to wit, whether Raper complied with his engagement so far as to authorise him to call on the appellant for a performance of his. Yet upon this we cannot help observing that, however fair the conduct of Raper, and however suspicious that of the other party may appear, Raper has not executed that which he had engaged to do, to wit, taking up the note of the appellant. The

West District
September 1814.

RAPER'S
HEIRS
vs.
YOCUM.

case of the appellees is certainly a hard one ; but their present suit to compel the appellant to the specific performance of his promise, must fail on this ground, as well as on the other.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant with costs.

O'CONNOR & AL. vs. BARRE.

Wife's prop-
erty, not
brought in
marriage or
dowry, is para-
phernal.

If a tutor
sell the real
property of
his ward, the
purchaser will
be quieted by
a possession of
four years af-
ter the ward
comes of age.

On the 6th of January 1764, Jacques Courta-
bleau obtained a requête from the commandant
of the Parish of Opelousas for a tract of land of
one hundred arpens of front, with the depth
of eighty on one side of the Opelousas River
and twenty arpens of front with the depth of forty
on the other side, and the 21st of 1765, a conces-
sion issued for that quantity. On the grant are
the following endorsements. "The said land was
"bought, at the auction of Mrs. Courtableau,
"by Mrs. Delamorandiere, to whom the present
"act and concession will serve as a title. Opelou-
"sas, 15th of October 1774. Le Chevalier
"Declouet."

"For Madame Marcantell, to whom the said
land properly belongs from this day and to her
heirs and assigns. Opelousas, 19th of October
1774, Le Chevalier Declouet. Delamorandiere."

ON the 20th of January 1780, the said tract of land was sold, at the sale of the estate of Mrs. Marcantell to Evan Mills; and after his death to wit, on the 4th of May 1782, it was inventoried as part of his estate: on the 5th of June 1783, the widow of Mills passed a sale for half of the tract and several negroes, to one Elliot, to whom the estate was indebted: on the 25th of June 1784, Elliot having received the sum due to him released the sale of the land. The widow married William Reed, shortly after Mills' death, and shortly after the marriage, the whole of the said tract of land was conveyed to the appellee by a deed of sale, made by the said Reed (with the consent of his wife as is stated in the deed) concluding in the usual form of notarial acts, *i. e.* that the parties appeared before him, the commandant of the post of Opelousas, and signed the same in the presence of the witnesses and of him the commandant. Which was signed by Reed and his wife and two witnesses, but not by the commandant.

MILLS left four daughters to wit: Helen, born in 1775, married to Peter O'Connor; Mannon, born in 1777, married to Dennis Lebrange; Clarissa born in 1779, married to Ezra Bushnell, and an infant two months old. The three first were married before they arrived to the age of 25 years: the last died a minor.

IN the year 1811, Peter O'Connor, Dennis

West District
September 1814.

O'CONNOR
& AL.
VS.
BARRE.

West District.
September 1814.

O'CONNOR
& AL.
vs.
BAKER.

Lebrenge, and Ezra Bushnell, in right of their wives instituted a suit against the appellant to recover the said tract of land, as the inheritance of their wives. The District Court decreed in favor of Lebrenge and Bushnell : but rejected the pretensions of O'Connor, on the plea of prescription : from which decree this appeal is taken.

Baldwin, for the plaintiffs. As this case has come up in the name of all the original plaintiffs I shall bring into view all their pretensions.

THE tract of land, demanded by the plaintiffs and appellants, descended to them at the death of their father and it still belongs to them, as it has never been legally sold. The sale made to Elliot was void for several reasons ; 1, there was no judicial sale of the estate, 2, the personal property was not first sold to pay the debts, 3, the sale was not authorized by the judicial authority.

THE property of minors cannot be sold without judicial authority : and if otherwise sold the sale will be set aside : Real estate cannot be sold until the moveables are exhausted. *Partidas* 6, tit. 16, Ley. 18, 1 *Martinez* 123, no. 25, 1 *Brown's Civil Law* 136, *Domat*, book 4, tit. 6, sec. 2, art. 24, 25, 26, 27. Here the authority was not given.

THE mother lost the right of tutorship, by her second marriage, and was bound to preserve for the children of the first marriage, the estate which descended from their deceased father. *Febrero*,

2 part, book 2, chap. 5, § 1, no. 3, *Custom of Paris* West District
 2d Vol. 224, 6 *Jurisp.* 142, 3 *Domat*, book 5, § September 1814.
 2, 7 *Martinez* 128, no. 3, 1 *Parf. Not.* 383-4.

O'Connor
 & Al.
 vs.
 BARR.

In addition to the foregoing objections to the legitimacy of the sale, the defendant and appellee has no color of title, by virtue of the deed under which he claims, as it never was completed and never went into effect. It is drawn in the usual form of notarial acts, and in the conclusion is stated to be drawn and passed before the commandant: but his signature is not annexed, which destroys its validity, as it is conclusive evidence to prove that the parties had changed their intentions, and would not acknowledge their signatures. But it was not the mother who sold. It was Reed with her consent, 1 *Martinez* 150, no. 77, *Domat*, book 1, tit. 1, § 1, art. 15, book 3, tit. 6, § 2, art. 6, 1, *Jurisp.* 135, 6, — *Parf. Not.* 63-4-5.

If it should be contended that the mother of the appellant made the deed it would give it no validity, as it is not in due form and accompanied with the requisite solemnities, *Febrero 1st part.* chap. 4, § 4, no. 117.

Porter, for the defendant. This suit is brought for 8800 arpents of land, which the appellants claim at their property, in right of their deceased father, Evan Mills. A recurrence to the statement of facts shews that the property was a portion of

West District.
September 1814.

O'CONNOR
& AL.
VS.
BARRÉ.

the acquets and gains, acquired during the marriage of said Mills and his wife, under whom the appellee claim and from whom he purchased ; one half of the land then was hers, at the dissolution of the marriage by the husband's death, and of this portion she had the right of disposal. 1 *Febrero lib. 1, cap. 4, § 1, no. 1, ibid. no. 4, 6, 29 and 31.*

AND she did not lose, by her second marriage with Reed, the right of enjoying and disposing of these acquets and gains, 2 *Febrero, lib. 2, cap. 5, § 2, no. 32, who cites, Ley 14 de Toro, which is Ley 6, tit. 9, lib. 5, Recop.*

FOR her half of the land then, we have acquired an undoubted title, and the decree of the District Court adjudging it to us must be confirmed.

THE remaining half 4400 arpents, the plaintiffs claim the three fourths of, as being heirs of Evan Mills, deceased, and the remaining fourth in right of their brother, who died a minor.

IT is admitted that the mother lost her right of inheriting from her child, by her second marriage. But she remained in possession, and had a right to the usufruct of the estate during her life, 2 *Febrero cinco Juicios, lib. 2, cap. 5, § 1, no. 7, ibid. lib. 2, cap. 5, § 2 no. 30.*

To the claim we oppose prescription.

A *bona fide* possessor with a just title, acquires a perfect right to immoveable property in ten years, *Domat, vol. 1, book-3, tit. 7, sect. 4, 4 Febrero, lib. 3, cap. 3, § 1, no. 105, Cooper's Just. b. 2, tit. 6.*

AND where the object claimed is a divisible one it runs against each heir for his portion. *Pothier vol. 4, page 647, no. 149, 4 Febrero cinco Juicios, lib. 3, cap. 3, § 1, no. 95.*

West District,
September 1814.

*O'CONNOR
& AL.
vs.
BERGE*

O'CONNOR's wife was more than thirty five years of age, when this action was commenced: being therefore ten years a major, without asserting her right, she and her husband are most clearly barred.

THE wife of Le Berge had not passed the age of majority ten years, when the appellee was sued. But by the evidence introduced, it was established that she was ten years married antecedent to the bringing of the suit, and that this property was a part of her paraphernal effects: there being no contract of marriage between her and Le Berge, the husband. Prescription, which does not run against a wife for her dotal effects during coverture, does for her paraphernal. *Vide 3 Febrero, lib. 3, cap. 2, § 4, no. 243.*

AND they are both equally prevented from now claiming their portion in the deceased brother's estate. It is true their mother had the usufruct in this property, during her life, if she had not alienated it. But from the moment of the alienation the right of usufruct was destroyed, the heirs had a right to demand the property, and not having done so in time, they cannot now recover, *Febrero cinco Juicios, lib. 1, cap. 7, § 2, no. 44.*

LE BERGE and wife's claim fails from another

West District
September 1814.

O'Connor
& AL.
vs.
BARGE

reason. After the death of Reed, the second husband, Le Berge entered into an arbitration with Jane Reed, the mother of his wife, for the rights of the latter in her father's estate, the arbitrators awarded him \$147, and in the account, where this balance is struck, a credit is given for the amount received for the sale of the property now claimed. It is true, we cannot shew a submission in legal form &c. to this award.

BUT we prove clearly his assent to it by shewing that he received the balance ascertained to be coming to him, by the persons appointed to arbitrate the claim then set up. And it is certainly unjust to permit him, after tacitly acquiescing in the sale, by receiving his part of the price, now to turn round and say that sale is invalid, and pray to have it set aside.

HIS authority to make this compromise and administer fully his wife's paraphernal effects is always presumed, when the wife does not make opposition, 1 *Febrero cinco Juicios*, lib. 1, cap. 3, § 1, no. 43 and 44.

BUSHNELL's right to the one third of the 4400 arpents is not disputed, the two other heirs cannot, it is hoped, recover for the reasons above stated.

BUT it is said that the sale made to us is such, that prescription cannot be pleaded on it and the arguments by which this objection is supported

age of such a nature as would require us to have a title in every way perfect. If we had a title of that kind there would be no occasion to plead prescription, and if the law only afforded protection in that way, to those whose title was complete in every shape, it is evident it would be entirely useless in its provisions: *they would not be under the necessity to resort to it.* Two things are necessary to enable a party in possession to plead prescription, good faith and a just title.

THE first is always presumed, and the contrary has not been shewn in this case. *Domat, vol. 1st liv. 3, tit. 7, sect. 4.*

THE just title consists, in buying from a person whom you have reason to believe has a good title. *Domat vol. 1, liv. 3, tit. 7, sect. 4, Pothier (quarto edition) vol. 4, pages 587, 588, 614, 615, nos. 28, 29, 98, 99.*

AND as to the form of the act, a *sous seing privé* is a good title, when accompanied by possession, *Pothier vol. 4, page 615, no. 99.*

ALL these circumstances combine in this case and justify the plea the appellee has put in.

By the Court. A plantation of considerable value, which the appellee bought twenty-four years ago, and of which he has been in possession ever since, is the subject of the present contention.

THE nature of the claim of the plaintiffs and

West District,
September 1814.

O'CONNOR
Clerk
vs.
BARRE

West. District.
September 1814.

O'CONNOR
& AL.
vs.
BARRE.

appellants is as follows: that plantation was the common property of Evan Mills and Jane Elliot, father and mother of the plaintiff, now appellant, Helen, when Evan Mills died. Evan Mills left four children, one of whom died in her infancy. After his decease, Jane, his widow, undertook (it does not appear by what authority) to administer the estate, and kept possession of the whole. Some time afterwards, she married William Reed, who, with her consent, sold to the appellee the plantation now in contest, Jane Reed died about four years ago; and in 1811, the appellants and their coheirs brought the present suit, claiming as their property the plantation left by their father, and alienated without right by their mother and her husband. The judgment of the District Court declares the alienation valid as to Jane Reed's moiety, allows to each of the appellants' coheirs a share in the other undivided moiety, and rejects the claim of the appellants, as barred by prescription.

THE principal points made by the appellants are:

1. THAT the sale is void altogether on two grounds, one of which is that the instrument purporting to be passed before the officer exercising the functions of Notary Public, is not signed by that officer; and the other, that the contract is not made with the solemnities necessary to bind a married woman.

2. THAT the undivided moiety of the plantation, being the property of minors, could not be alienated, even by their tutor, without the formalities prescribed by law.

West District.
September 1814.

O'CONNOR
vs.
BARR.

3. THAT Jane Elliot, widow Mills, having lost the tutorship of her children by contracting a second marriage, had no right whatsoever to dispose of their property in any manner.

ON the part of the appellee, the principal ground of defence is that the plaintiffs after they became of age, suffered the four years allowed by law to elapse without claiming against the sale made by their mother ; and that the appellants particularly remained silent on that subject during more than ten years, in consequence of which their claim is now barred by prescription.

VARIOUS other questions of minor importance have been raised during the discussion of this case, which we will have occasion to notice, as we proceed in the investigation of the subject.

I. THE first and most general allegation of the appellants, to wit, that the sale made by their mother is void *in toto*, can be soon disposed of. The half of the plantation in contest belonged to Jane Reed. It does not appear that she brought it in marriage as a dowry ; therefore it must be considered as paraphernal property. The alienation of such property by the husband, with the

West District.
September 1814.

O'Connor
v.
Baker

consent of the wife, was a lawful act. The instrument of sale, should it be thought defective in point of form as a public act, is certainly good as a private one, and is binding upon the parties and their heirs.

BUT if the sale in question is valid as to the moiety of the wife, the case is far different with respect to the other half of the plantation. An effort has been made to show that shortly after the death of Evan Mills, his widow acquired by purchase some part of that other moiety; for that having given in payment 4400 acres of that land to a creditor of the estate, who had a mortgage upon the whole, she afterwards paid him in some other manner, and he reconveyed to her the land which he had thus received. The pretended title, derived under such a transaction, cannot be the subject of a serious examination. The Court will, therefore, consider one half of the plantation bought by the appellee as the property of the heirs of Mills, and proceed to enquire into the validity of its alienation.

A tutor has not the power of alienating the real estate of his pupil, except in the cases provided for by law, and then only with permission of the judge. If, contrary to this provision, he alienates it, the minor may, within four years after he has come of age, obtain restitution of his property, on proving that the alienation has been injurious

to him (*Partida 6, tit. 19, lib. 2.*) But when he has suffered the four years to elapse without claiming any restitution, his silence is considered as an approbation of the act of his tutor, and the purchaser of his property is quieted in his possession. In this case, therefore, if the plantation had been sold by the tutor of the heirs of Mills, there can be no doubt that, having left the purchaser of it in peaceable possession during more than four years, they could not now disturb him.

BUT the estate of these minors has been sold not by their tutor, but by a mother who had no longer any right to act as their tutrix. The law declares in express terms that so soon as the mother contracts another marriage, she loses the tutorship of her children. It has made it the duty of the judge immediately to appoint an other tutor over them; and for the preservation of their property while it remains in the hands of the mother, it has provided that the estate of her new husband as well as hers shall be tacitly mortgaged. Thus, although she keeps possession of the estate of her children, and is bound to take care of it until it is surrendered into the hands of the new tutor, yet from the moment she marries, she loses the tutorship *ipso facto*, and has no longer any right to act as tutrix. Any alienation, therefore, which she may afterwards make of the property of her children, is entitled to no more respect than it would be if made by a stranger; and the

West District
September 1814.


O'CONNOR
& AL.
vs.
BARR.

West District.
September 1814.



O'CONNOR
& AL.
vs.
BARRÉ.

silence of the minors, which, in case of sales made by their tutor, is considered as an approbation, can receive no such interpretation in favor of sales made by persons having no right whatsoever over them.

THE only manner then in which the appellants may have forfeited their claim to a part of the plantation in contest is by having suffered the purchaser of it to remain in quiet possession a length of time sufficient to acquire a title by prescription.

THIS title is pleaded by the appellee; and it is not denied that the appellants have remained silent on the subject of their claim during more than ten years since Helen has come of age, and that both she and the appellee during that time lived in the same district.

BUT the appellants contend

1. THAT this is a prescription for which a just title and good faith are requisite, and that the appellee shews neither;

2. THAT the plantation in contest was an undivided property between the appellant Helen, and her younger sisters, and that the right by prescription having not been acquired against them, her own share has been thereby preserved.

THE just title and good faith required by law in the person claiming means no more than that he came to the possession of the thing by virtue of

some licit contract, *por alguna derecha razon*, (as it is expressed in law 18th. tit. 29, part a 23,) such as a sale, a donation, &c. into which he entered *bona fide*. That the present appellee acquired his possession by these means cannot be questioned. He bought this land from Reed and his wife as their property, and faithfully paid the full price of it. He comes forward with both a just title and good faith.

West. District.
September 1814.

O'CONNOR
& AL.
vs
BARRE.

BUT, it is further objected that prescription could not take effect against the appellant, Helen, so long as it did not run against her minor coheirs and joint owners of this undivided plantation. Upon this point it appears to the Court that the principle has been misunderstood by the appellants. In order that the prescription which does not run against minors may be also suspended in favor of the co-interested who are of age; it is not enough that the property, to which they have a right, be undivided; their claim must be *indivisible*. "If the claim," says Pothier, "has for its object some thing divisible *naturâ aut saltem intellectu*, as "if it is a claim for a certain estate, the time of the "prescription which does not run against the "minors for their part of the claim, does not cease "to run against those who are of age for their "parts."

It is, therefore, the opinion of this Court that the appellee has acquired a title by prescription to

West District.
September 1814.

O'CONNOR

& AL.

VS.

BARRE.

the fourth part of the half of the plantation in contest, which was the share of the appellant Helen in that property as one of the heirs of Evan Mills.

BUT it is further contended by the appellants that of the four shares into which the estate of Mills was to be divided, the usufruct of one fell to Jane Reed by the death of one of her children; and that while she enjoyed that usufruct the appellants could not claim their share of that portion, wherefore their right to that at least cannot have been prescribed against. To this it is answered by the appellee that Jane Reed, by alienating the property of which she was only usufructuary, forfeited her usufruct, and that from thence the appellants had as good a right to claim that property as their own part of the inheritance of their father.

It is the opinion of the authors and particularly of *Febrero* that the mother does not, as other usufructuaries, forfeit her usufruct by alienating the property which she is bound to keep and preserve for her children, and that such alienation is valid during her life time and can be revoked only after her death. Admitting this to be law, the right of the appellants to claim against the alienation of this portion did not begin until about four years ago, and consequently is not barred by prescription.

Thus, although the judgment of the inferior court appears to us, in every other respect, strictly conformable to law, it must be reversed as to this particular point.

It is, therefore, adjudged and decreed that the judgment of the District Court, rejecting *in toto* the claim of the appellants, be reversed; and that the appellants do recover one third part of the share of their deceased sister in the undivided moiety of the plantation in contest.

West District.
September 1816.

O'CONNOR
& AL.
VS.
BARRÉ.